IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 30 of 1995.

Decided on : October 10, 2006.

Smt. Satya Devi & ors. **…..Appellants.**

VERSUS

Sansar Chand & ors. **…..Respondents.**

Coram

The Hon'ble Mr. Justice Surjit Singh, Judge.

Whether approved for reporting?[1]

For the Appellants : **Mr. K.D.Sood, Advocate with Mr. B.K.Sood, Advocate.**

For the Respondents : **Mr. Ajay Sharma, Advocate.**

Surjit Singh, Judge (Oral)

Heard and gone through the record.

2. Suit was filed by the appellant Tirath Ram (now deceased and represented by his L.Rs), seeking a declaration that he had easementary right of necessity as also of prescription to pass through the vacant site, having 7.5 feet width, lying in front of the house of respondents- defendants and also for mandatory injunction, directing the defendants to remove the obstruction caused by them on a portion of that vacant site (hereinafter called path), whereby the width of that path had been reduced to 2.5 feet and to restore the width to its original dimension and also for permanent prohibitory injunction restraining the defendants- respondents from causing any

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Whether the reporters of the local papers may be allowed to see the Judgment?

obstruction in the said path. It was stated that the plaintiff had been using the aforesaid path since the times of his forefathers for going to his house and such user was going on for the last more than sixty years. It was alleged that the path had been used continuously without any objection or obstruction. It was further stated that in August, 1986, defendants reduced the width of that path in front of their house by constructing some stairs. The width was alleged to have been reduced to 2.5 feet. The suit was filed in June, 1987. Initially, only one of the respondents, namely Sansar Chand was impleaded as defendant. On the objection having been raised by said Sansar Chand that two of his brothers were joint owners of the house with him, in front of which the alleged path existed, they were necessary party and the suit was bad for their non-joinder, the appellant- plaintiff impleaded Sansar Chand's brothers, respondents Dharam Paul and Vijay Kumar, as defendants in the year 1991. Plaint was accordingly amended and it was stated that all the defendants had caused obstruction and reduced the width of the passage by constructing the stairs in August, 1986.

3. Respondents- defendants contested the suit. They denied that the plaintiff had the right to use the vacant site lying in front of their house as passage. It was alleged that passage for reaching the village common path was available to the plaintiff from the other side of his house and that the width of that passage was equal to the width of the vacant site lying in front of the plaintiff's house. It was claimed that the vacant site lying in front of the house of the defendants was used by them as exclusive approach for their

own house and that no other person including the plaintiff had the right to pass through that site.

4. Trial court framed various issues on the pleadings of the parties and tried the suit. At the end of the trial, it was held that the plaintiff had acquired an easement of passage by prescription and also he had the right to use the passage as an easement of necessity.

5. Defendants went in appeal to the court of District Judge. District Judge has reversed the finding of the trial court and set-aside the judgement and decree of the trial court. Consequently the suit of the appellant has been dismissed. The first appellate court has held that ingredients of easement of necessity have not been pleaded. It has further been held that alternate passage is available to the plaintiff and for this reason also he cannot claim the passage by way of easement of necessity. Dealing with the plea of acquisition of easementary right by prescription the first appellate court has held that as per requirement of Section 15 (last sentence) of the Easement Act, 1882, the plaintiff is required to show that he has been enjoying the easement within two years next before the institution of the suit and in the present case two of the defendants having been impleaded in the year 1991 and the alleged obstruction having been caused in August, 1986, the requirement of Section 15 (last sentence) could not be said to have been met. The first appellate court has relied upon Section 21 of the Limitation Act, to come to the conclusion that as against the newly added defendants, the suit is to be construed to

have been instituted in November, 1991 when they were impleaded as defendants.

6. The present appeal was admitted by this court on the following substantial questions of law:-

1. Whether on the pleadings of the parties a case of easement of necessity and prescription and the right of passage was pleaded and established from the material on record?

2. Whether the court was right in holding that the easement of necessity was not established and the suit of the plaintiff was barred?

3. Whether in view of the fact the suit of the plaintiff having been admittedly filed within two years and the alleged obstruction having been filed against Sansar Chand, the addition of Dharampal and Vijay Kumar after two years had the effect of extinction of easementary rights of the plaintiff when the suit was on the same cause of action and addition of parties was only to make effective the decree?

4. Whether the court below has misread and misconstrued the provisions of Section 13 and 15 of the Easement Act and Section 21 of the Limitation Act and the authorities cited have not been properly construed?

7. I have heard the learned counsel for the appellant and also gone through the record. The learned counsel has submitted that the plaintiff had pleaded all the ingredients of the easement of necessity and easement of prescription. To claim an easement by

way of necessity, the plaintiff is required to plead that at some given point of time the two tenements were held by one person and owing to transfer or bequest of one of the tenements it became essential for the enjoyment of one tenement to have an easementary right over the other tenement. Such a plea having not been raised in this case, the appellant- plaintiff cannot claim the right of passage by way of easement of necessity.

8. For claiming easement by prescription, plaintiff is required to plead and prove that he had been enjoying the easement as of right for a period of sixty years and that the enjoyment had been continuous and uninterrupted. In the present case, the plaintiff-appellant has neither pleaded nor established that he had been using he alleged passage as of right and so he cannot succeed even on the basis of plea of easement by prescription. Further more, two of the defendants were impleaded only in the year 1991, whereas the alleged obstruction had been caused, according to the plaintiff's own version, in August, 1986. Section 21(1) of the Limitation Act says that where after the institution of a suit, a new plaintiff or defendant is substituted or added the suit shall, as regards him, be deemed to have been instituted when he was so made a party. Proviso to this sub-section says that where the court is satisfied that the omission to implead a new plaintiff or defendant was due to a mistake made in good faith, it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date. In the present case, the trial court while ordering the impleadment of defendants No. 2 and 3, did not direct, by exercising

its powers under the aforesaid proviso, that the suit shall be deemed to have been instituted on some date earlier than the date of the impleadment of defendants No. 2 and 3. Therefore the plea of acquisition of easement by prescription was not available, on account of the non-fulfillment of requirement of last sentence of Section 15 of the Easement Act, 1882 as against these two defendants. Admittedly, all the three respondents- defendants are the joint owners of the house in front of which the claimed path lies. Plaintiff himself stated that all the three defendants caused the obstruction. That means, the cause of action against the defendants is not severable. In other words, when the plea of acquisition of easement by way of prescription is not available against defendants No. 2 and 3, it would not be enforceable even against defendant No. 1, on account of cause of action being not severable.

9. As a result of the above discussion, questions No. 1, 2, 3 and 4 are answered against the appellants. Consequently, the appeal is dismissed.

October 10, 2006. **(Surjit Singh)**
(*Hem*) **Judge.**